



## **CAFTA and Foreign Investor Lawsuits: A Threat to Environmental Standards**

### **The Environmental Threat**

The “investment” rules in the Central America Free Trade Agreement (CAFTA) grant broad privileges to multinational investors and allow these companies to enforce their rights by bringing suits directly to international tribunals. These investor suit rules pose a significant threat to environmental standards – both in the U.S. and Central America – by allowing foreign companies to completely bypass domestic courts to challenge legitimate laws and regulations.

CAFTA's foreign investor rules are similar to NAFTA's Chapter 11, which has given foreign companies broad rights that do not exist under U.S. law. In bringing these cases, foreign companies can demand compensation for the impact of environmental and public interest laws on their business interests.

CAFTA also includes explicit language that would allow foreign investors to challenge government decisions about natural resource agreements, such as federal oil, gas, and mineral leases. As a result, foreign companies could challenge royalty payments and other requirements before international tribunals, not U.S. or Central American courts.

Even if claims under these CAFTA rules do not succeed, companies can use the threat of international suits to intimidate small developing countries in Central America into settling for large sums of money or freezing adoption of environmental standards.

### **The Experience with NAFTA Chapter 11**

Under similar investor suit rules in Chapter 11 of NAFTA, both Mexico and Canada have already lost investor suits over environmental protections, and the U.S. faces environmentally related suits under those rules totaling more than \$1 billion.

- A Canadian company, Methanex, has sued the U.S. government for nearly \$1 billion, alleging that California's ban of the toxic gasoline additive MTBE would hurt the company's profits. Methanex produces a key component of MTBE, which has leaked from vehicle and storage tanks, poisoning California water supplies and putting citizens at risk for liver, kidney and nervous and gastrointestinal damage. MTBE has also contaminated the drinking supplies of at least 15 million Americans nationwide, according to the Environmental Working Group.
- The U.S. is also being sued by Glamis, a Canadian gold mining company, after California placed cleanup and remediation requirements on highly controversial mining operations that would harm the environment and destroy sacred Native American sites

in the state. The company says that the California laws and regulations will make its mining claims “uneconomic” and has demanded \$50 million from the U.S. government.

- Mexico was forced to pay \$16 million to a foreign investor when an ecologically sensitive zone it had established prevented the operation of a hazardous waste treatment facility.
- The Canadian government lost a Chapter 11 case when the country limited exports of PCBs – poisonous environmental pollutants - in an attempt to comply with an international environmental agreement. Even though the environmental treaty calls for export bans, the dispute panel ruled that Canada did not act in a “least trade restrictive” manner.

### **Is the “Chapter 11 Problem” Fixed in CAFTA?**

The Trade Act of 2002 required that investor suit rules should give foreign investors “no greater substantive rights” than U.S. citizens have under U.S. law. This provision was intended to appropriately limit the extensive rights that allow foreign companies to demand compensation for “indirect expropriation” – that is, the impacts of laws and regulation – and other overly broad, undefined standards.

Despite some limited changes, including transparency requirements for proceedings, **CAFTA’s investment rules clearly fail to meet this congressional mandate**. The agreement provides investors rights that are in no way limited by U.S. legal standards. For example, CAFTA fails to incorporate the following key principles from U.S. law:

- CAFTA does not ensure the right of the government to regulate a public nuisance – such as pollution released from a property – without compensating the property owner.
- CAFTA does not protect the government’s ability to take actions that affect personal property – such as banning the sale of a hazardous chemical – without paying any compensation.
- CAFTA includes the vague and open-ended standard of “minimum treatment” without limiting it to the U.S. legal principle of procedural due process. Under minimum treatment, foreign companies can demand compensation simply if they believe they have not been treated fairly by a government.

Moreover, the few U.S. standards that CAFTA claims to incorporate – such as “character of government action” – are left vague, are taken out of context from U.S. law, and are left to the subjective interpretation of tribunals not bound by U.S. law.

Finally, CAFTA’s language about the creation of an appeals process for investor suits is wholly inadequate. The agreement fails to provide specific rules for an appeals process and would allow future challenges to environmental laws to proceed before the process is put into place. And most importantly, because CAFTA fails to fix the underlying problems with investor suits, any appeals process would simply reinforce bad legal principles.